(6)

Supreme Court, U.S.
FILED
SEP 25 1997
CLERK

No. 97-369

In the

Supreme Court of the United States

October Term, 1996

COALITION FOR ECONOMIC EQUITY, et al.,
Petitioners,

v.

PETE WILSON, Governor of the State of California, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF WARD CONNERLY, RICHARD HANLIN, SAMUEL J. CULLERS, JANICE INGRAHAM, AND PACIFIC LEGAL FOUNDATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

*SHARON L. BROWNE
MARK T. GALLAGHER
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Facsimile: (916) 920-3444
Attorneys for Amici Curiae

26 pp

Table of Contents

Page

TABLE OF AUTHORITIES CITED ii

INTEREST OF AMICUS CURIAE 1

OPINIONS BELOW 5

STATEMENT OF THE CASE 5

SUMMARY OF ARGUMENT 8

ARGUMENT 9

THIS COURT SHOULD DENY THE PETITION AND ALLOW CALIFORNIA TO CONDUCT ITS NOVEL SOCIAL EXPERIMENT 9

CONCLUSION 19

Table of Authorities Cited

Page

Cases

Adarand Constructors, Inc. v. Pena, __ U.S. __, 115 S. Ct. 2097 (1995) 4,18

Arizona v. Evans, __ U.S. __, 115 S. Ct. 1185 (1995) ... 14

Arizonans for Official English v. Arizona, __ U.S. __, 117 S. Ct. 1055 (1997) 7,11-12

Bellotti v. Baird, 428 U.S. 132 (1976) 12

Board of Education of the Township of Piscataway v. Taxman, No. 96-679 4

Burford v. Sun Oil Co., 319 U.S. 315 (1943) 13

Chandler v. Miller, __ U.S. __, 117 S. Ct. 1295 (1997) .. 15

City of Richmond v. J.A. Croson Company, 488 U.S. 469 (1989) 4

Coalition for Economic Equity v. Wilson, 110 F.3d 1431 (9th Cir. 1997) 7-8,10-11

Coalition for Economic Equity v. Wilson, 946 F. Supp. 1480 (N.D. Cal. 1996) 5-7,10-11

Crawford v. Board of Education of the City of Los Angeles, 458 U.S. 527 (1982) 5

Page

Harrison v. National Association for the Advancement of Colored People, 360 U.S. 167 (1959) 12

High Voltage Wire Works, Inc. v. City of San Jose, Santa Clara Superior Court No. CV 768694 4

Hirabayashi v. United States, 320 U.S. 81 (1943) 15

Hunter v. Erickson, 393 U.S. 385 (1969) 5-6,8

Ingraham v. San Bernardino Community College District Governing Board, United States District Court, Eastern District of California, No. CIV-S-589 MLS GGH 3

Johnson v. Transportation Agency, Santa Clara County 480 U.S. 616 (1987) 4

Lackey v. Texas, __ U.S .__, 115 S. Ct. 1421 (1995) ... 14

Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959) 13

McCray v. New York, 461 U.S. 961 (1983) 14

New State Ice, Co. v. Liebmann, 285 U.S. 262 (1932) ... 14

Poe v. Ullman, 367 U.S. 497 (1961) 7,12

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987) 11,13

Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941) 11-13

Page

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) 14

United States v. Lopez, __ U.S. __, 115 S. Ct. 1624 (1995) 14

Washington v. Glucksberg, __ U.S. __, 117 U.S. 2258 (1997) 18

Washington v. Seattle School District No. 1, 458 U.S. 457 (1982) 5-6,8

Wilson v. State Personnel Board, Sacramento Superior Court No. 96-CS01082 4

Younger v. Harris, 401 U.S. 37 (1971) 11,13

Statutes

42 U.S.C. § 2000e-2(a)(1)-(2) 9

United States Constitution

Art. III, § 2 8,10

Fourteenth Amendment 4,9,12

§ 1 9

California Constitution

Art. I, § 31 2-8,10,14-15,18-19

§ 31(a) 6

Page

Art. II, § 10(a) 6

Rules

Supreme Court Rule 37.2 1

Rule 37.6 1

Miscellaneous

Emily Adams, Compton Mayor Offers Plans to Ease Tensions, L.A. Times, Sept. 8, 1994 16

David E. Hayes-Bautista & Gregory Rodriguez, California; New Year, We Will All Be Minorities, L.A. Times, Aug. 13, 1995 17

Sarah Lubman, Campuses Mull Admissions Without Affirmative Action, Wall St. J., May 16, 1995 16

Patrick McDonnell, As Change Again Overtakes Compton, So Do Tensions, L.A. Times, Aug. 3, 1994 17

Ed Mendel, Affirmative Action Goal: More White Men?, San Diego Union-Tribune, Oct. 16, 1996 16

Edmund Newton, Latinos Seeks Funding Parity After Black Group Gets City Grant, L.A. Times, Aug. 8, 1993 17

Page

Elaine Woo, Caught on the Wrong Side of the Line?,
L.A. Times, July 13, 1995 16

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, Ward Connerly, Richard Hanlin, Samuel J. Cullers, Janice Ingraham, and Pacific Legal Foundation respectfully submit this brief amicus curiae in opposition to the petition for writ of certiorari. The parties have consented to the filing of this amicus curiae brief. The letters of consent have been lodged with the Clerk of this Court.[1]

Ward Connerly was the chairman for the California Civil Rights Initiative campaign, the group responsible for placing Proposition 209 on the California ballot. A member of the University of California Board of Regents since 1993, Mr. Connerly focused the attention of the nation on the University's race-based system of preferences in its admissions policy. On July 20, 1995, following Mr. Connerly's lead, a majority of the Regents voted to end the University's use of race as a criteria for admission. Mr. Connerly is currently the chairman of the American Civil Rights Institute, a national non-profit organization aimed at educating the public about the problems created by racial and gender preferences.

Richard Hanlin is president and sole principal of Hanlin Construction, Inc., a small licensed construction firm headquartered in San Francisco, California. A white male, Mr. Hanlin wishes to be treated equally by his government without regard to his race and gender. Currently, Mr. Hanlin is not considered for certain public contracts administered by the City of San Francisco which have been completely set aside for

---

[1] Pursuant to Supreme Court Rule 37.6, amici affirm that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

minority- and women-owned businesses. Mr. Hanlin cannot take advantage of San Francisco's 10% bid preference reserved solely for minority- and women-owned businesses, whereby a favored business can bid up to 10% higher than the lowest qualified bidder and still win the contract. Mr. Hanlin's thin profit margins render his firm essentially noncompetitive for public contracts. Mr. Hanlin cannot compete equally for contracts let by many other municipal and state entities for the same reasons. Under Article I, Section 31, of the California Constitution (Article I, Section 31) [2] Mr. Hanlin will be able to compete on equal footing for public contracts administered by the City of San Francisco.

Samuel J. Cullers also stands to benefit from the implementation of Article I, Section 31, albeit for different reasons than Mr. Hanlin. Mr. Cullers is president and sole principal of Samuel J. Cullers & Associates, Inc., a licensed professional services contracting firm located in Sacramento, California. A black male, Mr. Cullers wishes to be treated equally by his government without regard to his race and gender. The current regime of set asides and preferences for minority- and women-owned contracting firms is discriminatory and stamps Mr. Cullers with an unwarranted badge of inferiority. Mr. Cullers wants the quality of his work to speak for itself. Instead, the current system harms Mr. Cullers' reputation and standing in the business community. Article I, Section 31, ends set-asides and other racial preferences and allows Mr. Cullers to be judged based upon his work, not the color of his skin. Further delay in the implementation of Article I, Section 31, will only serve to perpetrate the unfounded myth that Mr. Cullers cannot compete with other contractors without help from the government.

---

[2] Article I, Section 31, of the California Constitution is popularly known as the California Civil Rights Initiative or Proposition 209.

Janice Ingraham is a student at San Bernardino Valley Community College in San Bernardino, California. Ms. Ingraham is a white woman and has definite plans to apply to the nursing program at a University of California campus. Ms. Ingraham wishes to compete equally for a position in nursing school without regard to her race and gender, and also wishes to be treated equally by the Community College without regard to her race or gender. Ms. Ingraham previously challenged academic programs designed specifically for students of certain races. *Ingraham v. San Bernardino Community College District Governing Board*, United States District Court, Eastern District of California, No. CIV-S-589 MLS GGH. A settlement was reached with the California Community Colleges, which opens programs at 106 California Community Colleges to all students equally without regard to race. Additionally, the settlement prohibits the Community Colleges from discouraging students from participating in classes on the basis of race or advertising their programs in such a way to imply that a program is designed for students of particular races. Ms. Ingraham served as regional coordinator for the "Yes on 209" campaign, and spoke publicly in favor of passage of the measure on numerous occasions. Ms. Ingraham has three young daughters, two of whom are white and one of whom is half Mexican-American. Ms. Ingraham wishes her daughters to be treated equally without regard to their race or gender. In pursuing her educational goals, Ms. Ingraham wishes to be judged as an individual, this will not occur until Article I, Section 31, is implemented.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's

position has broad support within the general community. PLF's Board has authorized the filing of a brief amicus curiae in this matter.

Pacific Legal Foundation is submitting this brief because it believes its public policy perspective and litigation experience in the area of group-based preferences and civil rights will provide an additional viewpoint with respect to the issues presented. PLF has participated in numerous other cases involving group-based preferences before this Court including, but not limited to, *Board of Education of the Township of Piscataway v. Taxman*, No. 96-679; *Adarand Constructors, Inc. v. Pena*, ___U.S.___, 115 S. Ct. 2097 (1995); *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989); and *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987).

Pacific Legal Foundation attorneys are also counsel of record in state court cases seeking to implement Article I, Section 31, of the California Constitution. *Wilson v. State Personnel Board*, Sacramento Superior Court No. 96-CS01082 (suit filed on behalf of California Governor Pete Wilson and Proposition 209 Chairman Ward Connerly seeking to invalidate five California statutory schemes under Article I, Section 31, and the Equal Protection Clause); *High Voltage Wire Works, Inc. v. City of San Jose*, Santa Clara Superior Court No. CV 768694 (suit seeking a judicial declaration that San Jose City contracting ordinance grants a preference to certain groups and individuals on the basis of race and gender in violation of Article I, Section 31).

Amici contend that Article I, Section 31, of the California Constitution is entirely consistent with both the Fourteenth Amendment to the United States Constitution and Title VII of the Civil Rights Act of 1964. Recognizing that the parties to this action will do an excellent job of discussing the "*Hunter*

trilogy"[3] and explaining its applicability to Article I, Section 31, amici will focus on a broader, albeit no less important issue: whether notions of comity and federalism counsel against granting the petition for writ of certiorari.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of California enjoining the defendant class[4] from implementing Article I, Section 31, is reported at 946 F. Supp. 1480 (N.D. Cal. 1996). The opinion of the Ninth Circuit Court of Appeals vacating the preliminary injunction and declaring Article I, Section 31, constitutional, is reported at 110 F.3d 1431 (9th Cir. 1997).

STATEMENT OF THE CASE

On November 5, 1996, California voters amended their constitution to guaranty that their state would

---

[3] The "*Hunter* trilogy" is composed of *Hunter v. Erickson*, 393 U.S. 385 (1969); *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982); and *Crawford v. Board of Education of the City of Los Angeles*, 458 U.S. 527 (1982).

[4] The certified defendant class consists of "all state officials, local government entities or other governmental instrumentalities bound by Proposition 209." *Coalition for Economic Equity v. Wilson*, 946 F. Supp. 1480, 1490, n.6 (N.D. Cal. 1996).

> not discriminate against, or grant preferential treatment to, any individuals on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

Cal. Const. Art. I, § 31(a).[5] This victory at the ballot box for initiative supporters was short lived as opponents of Article I, Section 31, quickly moved the battle from the political arena to the federal courthouse. On November 6, 1996, minutes after the courthouse doors opened and before Article I, Section 31, had been implemented or enforced against anyone, this case was initiated in the United States District Court of the Northern District of California. Plaintiffs stated two causes of action. First, they claimed that Article I, Section 31, of the California Constitution violated the Equal Protection Clause as interpreted by this Court in *Hunter v. Erickson*, 393 U.S. 385, and *Washington v. Seattle School District No. 1*, 458 U.S. 457. *Coalition*, 946 F. Supp. at 1489. Second, they alleged that Article I, Section 31, was inconsistent with, and therefore preempted by, Titles VI and VII of the Civil Rights Act of 1964 and Title IX of the Educational Amendments of 1972. *Id.* at 1490. Declining to abstain until a state court had been provided with an opportunity to interpret Article I, Section 31,[6] the District Court granted a temporary restraining order on

---

[5] This provision of the California Constitution became effective on November 6, 1996. Cal. Const. Art. II, § 10(a). ("An initiative statute or referendum approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise.").

[6] *Coalition*, 946 F. Supp. at 1492 n.8 ("After having carefully reviewed the circumstances that defendants have forwarded in support of their request for abstention, this Court chooses not to abstain.").

November 27, 1996, and granted a preliminary injunction on December 23, 1996. *Coalition*, 946 F. Supp. at 1491. An appeal followed.

On April 8, 1997, the Ninth Circuit Court of Appeals reversed and vacated the preliminary injunction. *Coalition for Economic Equity v. Wilson*, 110 F.3d 1431, 1448 (9th Cir. 1997). Before addressing the equal protection and preemption issues raised by this case the Ninth Circuit "pause[d] to consider whether this case even belongs in federal court." *Coalition for Economic Equity v. Wilson*, 110 F.3d at 1436. The Ninth Circuit acknowledged that as a "general rule" the federal courts "'ought not to consider the Constitutionality of state statute in the absence of a controlling interpretation of its meaning and effect by the state courts.'" *Id.* at 1437 (quoting *Arizonans for Official English v. Arizona*, ___U.S.___, 117 S. Ct. 1055, 1072 (1997) (quoting *Poe v. Ullman*, 367 U.S. 497, 526 (1961) (Harlan, J., dissenting)). Although concerned with addressing the constitutionality of a "one-day-old, never-applied-law" the Ninth Circuit determined that given the District Court's extensive factual finding in this matter it could properly reach the merits of the case. *Coalition*, 110 F.3d at 1437.

Turning to the merits, the Ninth Circuit analyzed the constitutionality of Article I, Section 31, under two distinct lines of equal protection authority.[7] Applying the "conventional" method of equal protection analysis the court concluded that "there is simply no doubt that Proposition 209 is constitutional." *Coalition*, 110 F.3d at 1439. The Ninth

---

[7] According to the court, this case implicated "conventional" equal protection analysis, "which looks to the substance of the law at issue," as well as "political structure" equal protection analysis, "which looks to the level of government at which the law was enacted." *Coalition*, 110 F.3d at 1439.

Circuit was equally empathic in its conclusion that Article I, Section 31, survived constitutional scrutiny under the "political structure" equal protection analysis articulated by this Court in *Hunter* and *Seattle School District No 1*. "The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits." *Coalition*, 110 F.3d at 1446. A petition for rehearing was denied and a suggestion for rehearing en banc was rejected by the Ninth Circuit on August 21, 1997. Shortly thereafter a petition for writ of certiorari was filed in this Court.

SUMMARY OF ARGUMENT

This Court has long been of the view that although a "case" or "controversy" may satisfy the requirements of Article III, Section 2, of the United States Constitution, principles of federalism and comity militate against federal court jurisdiction. The question to be asked in constitutional cases that threaten state laws is whether the conflict is really necessary. Federal courts should hesitate before ruling on the constitutionality of state constitutional provisions out of deference to principles of federalism and in recognition that states should be allowed a certain amount of freedom to conduct novel social experiments.

By enacting Article I, Section 31, California voters have begun just such an experiment. Unfortunately, this venture was placed on hold as this case has made its way through the federal judiciary. Denying the petition for writ of certiorari would allow California to continue this novel and critical social experiment in what may very well be the most important area of social policy in our Country today.

ARGUMENT

THIS COURT SHOULD DENY THE PETITION AND ALLOW CALIFORNIA TO CONDUCT ITS NOVEL SOCIAL EXPERIMENT

This case asks an exceedingly simple question: may the voters of California, consistent with the Equal Protection Clause of the Fourteenth Amendment[8] and Title VII of the Civil Rights Act of 1964,[9] add to their constitution a provision that

---

[8] The Equal Protection Clause promises that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

[9] Title VII of the Civil Rights Act provides in pertinent part:

> It shall be an unlawful employment practice for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1)-(2).

explicitly prohibits their state from discriminating against, or granting preferential treatment to, any group or individual on the basis of immutable characteristics such as race and gender? Although simple, the significance of this question cannot be overstated, as California becomes more diverse questions of how the state government interacts with its increasing multi-ethnic citizenry take on an increased sense of importance and urgency.

This simple, yet significant, question should answer itself. Unfortunately, nearly one year after the voters of California expressed their strong desire[10] that their state must stop making decisions on the basis of race, sex, color, ethnicity, or national origin, the constitutional status of Article I, Section 31, remains in doubt. Denying the petition for writ of certiorari, thereby allowing the Ninth Circuit's decision to stand, would remove this doubt and allow the State of California to embark on its bold social experiment. Amici respectfully submit that principles of federalism and comity favor denying the petition for writ of certiorari and allowing the State of California to begin implementing Article I, Section 31, of the California Constitution.

Article III, Section 2, of the United States Constitution limits the federal courts to the adjudication of "cases" and "controversies." Determining that a case falls within the parameters of Article III does not end the inquiry, it merely changes the question from is this a case that the federal court ***can*** hear to is this a case that the federal court ***should*** hear. In the present case the District Court declined the defendants' motion to abstain until a state court had been given the opportunity to interpret Article I, Section 31. *Coalition*,

---

[10] Proposition 209 passed by a margin of 54% to 46%. 4,736,180 Californians voted for the initiative and 3,986,196 cast ballots against it. *Coalition*, 110 F.3d at 1435.

946 F. Supp. at 1492 n.8. The Court of Appeals explained its reluctance to enter the fray, but concluded that, in spite of the strong federalism concerns, "this conflict really is necessary." *Coalition*, 110 F.3d at 1438 (quoting *Arizonans for Official English*, 117 S. Ct. at 1072). The question now becomes, in light of the Ninth Circuit's opinion, is further federal court review warranted, or may the State of California proceed with its challenging endeavor to develop a new and more equitable social policy with respect to how state government, in its official actions, shall address questions of race, sex, color, ethnicity, and national origin. In other words, is this conflict still necessary?

This Court has long recognized that even though a case may satisfy the requirements of Article III, in certain situations the federal judiciary should decline an invitation to exercise its jurisdiction over the matter. This is especially true in a case, such as the one at bar, where a fairly novel, uninterpreted state law is charged with being in violation of the United States Constitution. In *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 501 (1941), this Court described the desirability of federal courts "exercising a wise discretion," and restraining their authority in order to give "scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary." Similarly in *Younger v. Harris*, 401 U.S. 37 (1971), this Court explained that federal courts should decline to exercise jurisdiction based upon the notion of comity or "a proper respect for state functions." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 10 (1987).[11]

---

[11] This Court has recognized the need to decline jurisdiction even in cases, such as the one at bar, that include claims that fundamental constitutional rights and liberties are at stake. In fact, the seminal case of *Pullman* involved a claim of racial

(continued...)

More recently, in a case challenging the federal constitutional propriety of a state constitutional amendment, this Court explained that before a federal court embarks upon a constitutional analysis it must first pause to ask, "Is this conflict really necessary?" *Arizonans for Official English v. Arizona*, 117 S. Ct. at 1072. Echoing the wisdom of Justice Harlan an unanimous Court explained:

> When anticipatory relief is sought in federal court against a state statute, respect for the place of the States in our federal system calls for close consideration of that core question. ... Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court.

Arizonans for Official English, 117 S. Ct. at 1073-74 (citing *Poe v. Ullman*, 367 U.S. at 526 (Harlan, J., dissenting).

---

[11](...continued)
discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. Despite the "substantial constitutional issue" raised by the case, this Court recognized that abstention was appropriate until a state court had interpreted the law in question. *Pullman*, 496 U.S. at 500. *Accord*, *Harrison v. National Association for the Advancement of Colored People*, 360 U.S. 167 (1959) (abstention required in a case involving Equal Protection and Free Speech challenges); *Bellotti v. Baird*, 428 U.S. 132 (1976) (abstention appropriate in case involving parental consent requirement before an abortion may be performed).

Abstention and related doctrines arise in a number of different contexts,[12] they are, however, bound together by a single common denominator, the concept of federalism. The United States are composed of sovereign units of government entitled to a certain amount of latitude in order to experiment with novel solutions to social and political problems. The idea that federalism allows the states to conduct novel, often bold, social and economic experiments, was first expressed by Justice Brandeis. His eloquent statement on this subject bears repeating:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. ... But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

---

[12] *Compare Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (abstention to avoid unnecessary constitutional ruling); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959) (abstention in case based on diversity of citizenship because of unclear state law); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) (abstention in cases involving state administrative procedures); *Younger v. Harris*, 401 U.S. 37 (abstention to avoid interference with state court criminal proceedings); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (abstention to avoid interference with state court civil proceedings).

New State Ice, Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandies, J., dissenting). *Accord, San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 49-50 (1973); *United States v. Lopez*, __ U.S. __, 115 S. Ct. 1624, 1641 (1995) (Kennedy, J., concurring) ("In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.").[13]

Questions of racial and gender classifications have divided our nation since its inception. This Court has long been

---

[13] The "laboratory" metaphor has also arisen in another line of this Court's jurisprudence which bears directly on the case at bar. Members of this Court have explained that "[o]ften a denial of certiorari on a novel issue will permit state and federal courts to 'serve as laboratories in which the issue receives further study before it is addressed by this Court." *Lackey v. Texas*, __ U.S. __, 115 S. Ct. 1421 (1995) (Stevens, J., respecting the denial of certiorari) (quoting *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., joined by Blackmun, J., and Powell, J., respecting the denial of a petition for writ of certiorari). This is true even in cases where the underlying issue is "important." *McCray*, 461 U.S. at 961 (questioning constitutionality of race based preemptory challenges); *Lackey*, 115 S. Ct. at 1421 (questioning whether executing a prisoner who has already spent 17 years on death row violates the Eight Amendment's prohibition against cruel and unusual punishment). For the moment, Article I, Section 31, is unique. However, as the petition for writ of certiorari notes, measures similar to Proposition 209 have been proposed in 26 states. Petition at 16. Allowing lower courts to address these issues "may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, __ U.S. __, 115 S. Ct. 1185, 1198 n.1 (1995) (Ginsburg, J., dissenting).

of the view that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality" and that "racial distinctions are in most circumstances irrelevant and therefore prohibited." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Despite this long-standing recognition that classifications based solely on race are irrelevant and ought to be rejected, state governments have long struggled with the issue of how to remedy the present effects of prior racial discrimination and how best to "diversify" work forces and student bodies. The answer to these questions "is far from clear." California, by amending its Constitution to prohibit the state from discriminating against, or granting preferential treatment to, any individual on the basis of race or gender has, in the words of Justice Brandies, undertaken a "courageous" and "novel social experiment" to develop a new and fairer social policy governing official actions by the state.[14]

This experiment is especially appropriate in a state as richly diverse as California, where programs designed to benefit one racial group have an adverse impact on others. For example:

- Asians were severely burdened by race-conscious University of California admissions,

---

[14] It almost goes without saying that while these experiments can certainly be innovative and unique, they cannot contravene the constitutional mandate. "These novel experiments, of course, must comply with the United States Constitution; but their mere novelty should not be a strike against them." *Chandler v. Miller*, __ U.S. __, 117 S. Ct. 1295, 1306 (1997) (Rehnquist, C.J., dissenting). For all the reasons put forward in respondents' oppositions to the petition for writ of certiorari, amici agrees that Article I, Section 31, is entirely consistent with the United States Constitution.

often more than whites. *See, e.g.*, Sarah Lubman, *Campuses Mull Admissions Without Affirmative Action*, Wall St. J., May 16, 1995, at B1 (under color-blind system, Asians would have made up 7.6% to 10.4% more of the 1994 freshman class at UC Berkeley than they did under the preferential system; whites would have made up 2% to 7.5% more).

- Chinese-Americans found themselves facing a 40% maximum quota--supposedly justified by "diversity" and desegregation concerns--in admissions to the prestigious Lowell High School in San Francisco. Elaine Woo, *Caught on the Wrong Side of the Line?*, L.A. Times, July 13, 1995, at A1.

Similarly, "goals" and "timetables" could just as well be turned against nonwhites as in their favor:

- True to their schemes of racial proportionality, California government agencies had begun setting "goals" and "timetables" to increase the hiring of *whites* in jobs where whites were under- represented. Ed Mendel, *Affirmative Action Goal: More White Men?*, San Diego Union-Tribune, Oct. 16, 1996, at A-1.

- There are calls for more programs that benefit one nonwhite group at the expense of another. *See, e.g.*, Emily Adams, *Compton Mayor Offers Plans to Ease Tensions*, L.A. Times, Sept. 8, 1994, at B3 (Latino leaders in Compton--where 51% of the population is Latino, but 78% of the city employees are

> African-American--were pushing for an affirmative action program that would benefit Latinos); Patrick McDonnell, *As Change Again Overtakes Compton, So Do Tensions*, L.A. Times, Aug. 3, 1994, at A3 (discussing Latino claims that they are greatly under represented in Los Angeles postal jobs, while African-Americans are greatly over represented). Edmund Newton, *Latinos Seek Funding Parity After Black Group Gets City Grant*, L.A. Times, Aug. 8, 1993, at J3.

In a state as ethnically mixed as California, any racial group may well find itself the victim of racial preferences and basing social policy on the need to balance the interests of "minorities" against the interests of the "majority" no longer makes sense. In many California cities, whites have long been a minority, and they are now becoming a minority in the state as a whole. There will shortly be no "majority" California racial group at all. David E. Hayes-Bautista & Gregory Rodriguez, *California; New Year, We Will All Be Minorities*, L.A. Times, Aug. 13, 1995, at M1. In such a situation, all groups stand to gain from a ban on government race and gender discrimination because government institutions cannot be trusted with the awesome power to distribute among competing groups entitlements, benefits, and privileges on the basis of race, sex, color, or national origin. As California moves into the next century it is becoming increasingly apparent that antiquated notions of racial preferences and discrimination against some in favor of others represents a failed social policy. California voters have, accordingly, rejected this social policy and embarked upon a new course, tolerating no discrimination whether it be based on benign or malicious intent.

> In my mind, government-sponsored racial discrimination based on benign prejudice is just as

> noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple.

Adarand Constructors, Inc. v. Pena, 115 S. Ct. at 2119 (Thomas, J., concurring).

Last term, in the context of another politically charged case, this Court reemphasized that important questions of social policy are best decided by an informed electorate, not the judiciary.

> Throughout the nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.

Washington v. Glucksberg, __U.S. __, 117 S. Ct. 2258, 2275 (1997). Unfortunately, California's bold social experiment has been placed on hold for nearly one year by the premature intervention of the federal courts in a matter of broad social policy. A denial of the petition for writ of certiorari would allow the State of California to move forward with its new policy of nondiscrimination and begin to serve as a laboratory that the rest of the nation can observe and, should California's policy prove to be a wise one, emulate. This conflict is no longer necessary. The court below has left no doubt as to the facial constitutional validity of Article I, Section 31. Amici urge this Court to recognize, as did the opinion below, that California's willingness to carry out this courageous experiment is simply one of the "happy incidents of federalism." Denying the petition for writ of certiorari would allow California's "novel social experiment" to proceed unencumbered and without further delay.

CONCLUSION

Democracy is, by definition, self-correcting. By ratifying Article I, Section 31, the State of California has departed from the rest of the nation on issues of racial and gender preferences and discrimination. If California's experiment fails to create a fair and just result in this volatile area of social policy, voters are free to amend their Constitution once again, and repeal Article I, Section 31, in favor of another course of action. If, on the other hand, the experiment succeeds, other states will certainly follow California's lead, and adopt similar prohibitions on governmental discrimination. Denying the petition for writ of certiorari allows this profound debate to continue, "as it should in a democratic society."

DATED: September, 1997.

Respectfully submitted,

*SHARON L. BROWNE
MARK T. GALLAGHER
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Facsimile: (916) 920-3444

Attorneys for Amici Curiae